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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 JOSEPH E JOHNSON JR.,

No. C 08-05148 SI

9 Petitioner,

ORDER TO SHOW CAUSE

10 v.

11 ROBERT L. AYERS, *et al.*,

12 Respondents.
13 _____/

14 **INTRODUCTION**

15 Joseph Everett Johnson, Jr., an inmate at San Quentin State Prison, filed this action for a writ
16 of habeas corpus pursuant to 28 U.S.C. § 2254. His petition is now before the court for review pursuant
17 to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.
18

19 **BACKGROUND**

20 On July 22, 2005, following a jury trial at San Mateo County Superior Court, Johnson was
21 convicted of unlawful vehicle taking, possession of a firearm by a felon, possession of ammunition by
22 a felon, possession of drug paraphernalia, and receiving stolen property. *See* Cal. Veh. Code §
23 10851(a); Cal. Penal Code §§ 12021(a), 12316(b)(1), 496(a); Cal. Health & Safety Code § 11364. The
24 trial court found that Johnson had been convicted of a prior serious felony for which he served a term
25 of imprisonment within the meaning of Cal. Penal Code §§ 667.5(b) and 1170.12(c)(1). On September
26 30, 2005, he was sentenced to term of nine years and eight months. Johnson appealed. His
27 conviction and sentence were affirmed by the California Court of Appeal on October 30, 2006, and his
28 petition for review was denied by the California Supreme Court on January 3, 2007.

Johnson petitioned to the United States Supreme Court and was granted a writ of certiorari. On April 16, 2007, the United States Supreme Court vacated Johnson's judgment, and remanded the case to the California Court of Appeal on April 16, 2007. On remand, the California Court of Appeal re-affirmed petitioner's conviction on September 27, 2007. Johnson's second petition for review was denied by the California Supreme Court on December 12, 2007. On March 3, 2008, Johnson's second petition for a writ of certiorari was denied. Johnson then filed this action.

DISCUSSION

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A district court considering an application for a writ of habeas corpus shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or false. *See Hendricks v. Vasquez*, 908 F. 2D 490, 491 (9th Cir. 1990).

Johnson asserts that his sentence was imposed in violation of his Sixth and Fourteenth Amendment rights because the court relied on sentence-elevating factors not found by a jury to impose an upper term sentence. *See Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856 (2007).

CONCLUSION

For the foregoing reasons,


1. The petition states cognizable claims for habeas relief and warrants a response.
2. The clerk shall serve by certified mail a copy of this order, the petition and all attachments thereto upon respondent and respondent's attorney, the Attorney General of the State of California. The clerk shall also serve a copy of this order on petitioner.
3. Respondent must file and serve upon petitioner, on or before **March 26, 2009**, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why

1 a writ of habeas corpus should not be issued. Respondent must file with the answer a copy of all
2 portions of the court proceedings that have been previously transcribed and that are relevant to a
3 determination of the issues presented by the petition.

4 4. If petitioner wishes to respond to the answer, he must do so by filing a traverse with the
5 court and serving it on respondent on or before **April 30, 2009**.

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7 **IT IS SO ORDERED.**

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9 Dated: 1/26/09



SUSAN ILLSTON
United States District Judge